

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ALEX GALLEGOS,

Plaintiff,

v.

CAROLYN W. COLVIN,
Acting Commissioner of Social
Security,

Defendant.

No. 1:16-CV-03002-RHW

**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND ORDER OF
REMAND FOR FURTHER
PROCEEDINGS**

Before the Court are the parties' cross-motions for summary judgment, ECF Nos. 15 & 17. Mr. Gallegos brings this action seeking judicial review, pursuant to 42 U.S.C. § 405(g), of the Commissioner's final decision, which denied his application for Supplemental Security Income under Title XVI of the Social Security Act, 42 U.S.C §§ 1381-1383F. After reviewing the administrative record and briefs filed by the parties, the Court is now fully informed. For the reasons set

1 forth below, the Court **GRANTS** Plaintiff's Motion for Summary Judgment and
2 **REMANDS** for additional proceedings consistent with this order.

3 **I. Jurisdiction**

4 Mr. Gallegos filed for Supplemental Security Income on March 23, 2010.
5 AR 226. His alleged onset date is May 4, 1988. *Id.* Mr. Gallegos' application was
6 initially denied on December 29, 2010, AR 89-92, and on reconsideration on
7 January 17, 2012, AR 98-104.

8 A hearing with Administrative Law Judge ("ALJ") Stephanie Martz
9 occurred on April 8, 2014. AR 32-65. On May 14, 2014, the ALJ issued a decision
10 finding Mr. Gallegos ineligible for disability benefits. AR 15-27. The Appeals
11 Council denied Mr. Gallegos' request for review on November 10, 2015, AR 1-5,
12 making the ALJ's ruling the "final decision" of the Commissioner.

13 Mr. Gallegos timely filed the present action challenging the denial of
14 benefits, on January 8, 2016. ECF No. 3. Accordingly, Mr. Gallegos' claims are
15 properly before this Court pursuant to 42 U.S.C. § 405(g).

16 **II. Sequential Evaluation Process**

17 The Social Security Act defines disability as the "inability to engage in any
18 substantial gainful activity by reason of any medically determinable physical or
19 mental impairment which can be expected to result in death or which has lasted or
20 can be expected to last for a continuous period of not less than twelve months." 42

1 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). A claimant shall be determined to be
2 under a disability only if the claimant's impairments are of such severity that the
3 claimant is not only unable to do his previous work, but cannot, considering
4 claimant's age, education, and work experience, engage in any other substantial
5 gainful work that exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A) &
6 1382c(a)(3)(B).

7 The Commissioner has established a five-step sequential evaluation process
8 for determining whether a claimant is disabled within the meaning of the Social
9 Security Act. 20 C.F.R. §§ 404.1520(a)(4) & 416.920(a)(4); *Lounsbury v.*
10 *Barnhart*, 468 F.3d 1111, 1114 (9th Cir. 2006).

11 Step one inquires whether the claimant is presently engaged in "substantial
12 gainful activity." 20 C.F.R. §§ 404.1520(b) & 416.920(b). Substantial gainful
13 activity is defined as significant physical or mental activities done or usually done
14 for profit. 20 C.F.R. §§ 404.1572 & 416.972. If the claimant is engaged in
15 substantial activity, he or she is not entitled to disability benefits. 20 C.F.R. §§
16 404.1571 & 416.920(b). If not, the ALJ proceeds to step two.

17 Step two asks whether the claimant has a severe impairment, or combination
18 of impairments, that significantly limits the claimant's physical or mental ability to
19 do basic work activities. 20 C.F.R. §§ 404.1520(c) & 416.920(c). A severe
20 impairment is one that has lasted or is expected to last for at least twelve months,

1 and must be proven by objective medical evidence. 20 C.F.R. §§ 404.1508-09 &
2 416.908-09. If the claimant does not have a severe impairment, or combination of
3 impairments, the disability claim is denied, and no further evaluative steps are
4 required. Otherwise, the evaluation proceeds to the third step.

5 Step three involves a determination of whether any of the claimant's severe
6 impairments "meets or equals" one of the listed impairments acknowledged by the
7 Commissioner to be sufficiently severe as to preclude substantial gainful activity.
8 20 C.F.R. §§ 404.1520(d), 404.1525, 404.1526 & 416.920(d), 416.925, 416.926;
9 20 C.F.R. § 404 Subpt. P. App. 1 ("the Listings"). If the impairment meets or
10 equals one of the listed impairments, the claimant is *per se* disabled and qualifies
11 for benefits. *Id.* If the claimant is not *per se* disabled, the evaluation proceeds to
12 the fourth step.

13 Step four examines whether the claimant's residual functional capacity
14 enables the claimant to perform past relevant work. 20 C.F.R. §§ 404.1520(e)-(f)
15 & 416.920(e)-(f). If the claimant can still perform past relevant work, the claimant
16 is not entitled to disability benefits and the inquiry ends. *Id.*

17 Step five shifts the burden to the Commissioner to prove that the claimant is
18 able to perform other work in the national economy, taking into account the
19 claimant's age, education, and work experience. *See* 20 C.F.R. §§ 404.1512(f),
20 404.1520(g), 404.1560(c) & 416.912(f), 416.920(g), 416.960(c). To meet this

1 burden, the Commissioner must establish that (1) the claimant is capable of
2 performing other work; and (2) such work exists in “significant numbers in the
3 national economy.” 20 C.F.R. §§ 404.1560(c)(2); 416.960(c)(2); *Beltran v. Astrue*,
4 676 F.3d 1203, 1206 (9th Cir. 2012).

5 **III. Standard of Review**

6 A district court's review of a final decision of the Commissioner is governed
7 by 42 U.S.C. § 405(g). The scope of review under § 405(g) is limited, and the
8 Commissioner's decision will be disturbed “only if it is not supported by
9 substantial evidence or is based on legal error.” *Hill v. Astrue*, 698 F.3d 1144,
10 1158-59 (9th Cir. 2012) (citing § 405(g)). Substantial evidence means “more than
11 a mere scintilla but less than a preponderance; it is such relevant evidence as a
12 reasonable mind might accept as adequate to support a conclusion.” *Sandgathe v.*
13 *Chater*, 108 F.3d 978, 980 (9th Cir.1997) (quoting *Andrews v. Shalala*, 53 F.3d
14 1035, 1039 (9th Cir. 1995)) (internal quotation marks omitted). In determining
15 whether the Commissioner’s findings are supported by substantial evidence, “a
16 reviewing court must consider the entire record as a whole and may not affirm
17 simply by isolating a specific quantum of supporting evidence.” *Robbins v. Soc.*
18 *Sec. Admin.*, 466 F.3d 880, 882 (9th Cir. 2006) (quoting *Hammock v. Bowen*, 879
19 F.2d 498, 501 (9th Cir. 1989)).

1 In reviewing a denial of benefits, a district court may not substitute its
2 judgment for that of the ALJ. *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir.
3 1992). If the evidence in the record “is susceptible to more than one rational
4 interpretation, [the court] must uphold the ALJ's findings if they are supported by
5 inferences reasonably drawn from the record.” *Molina v. Astrue*, 674 F.3d 1104,
6 1111 (9th Cir. 2012); *see also Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir.
7 2002) (if the “evidence is susceptible to more than one rational interpretation, one
8 of which supports the ALJ’s decision, the conclusion must be upheld”). Moreover,
9 a district court “may not reverse an ALJ's decision on account of an error that is
10 harmless.” *Molina*, 674 F.3d at 1111. An error is harmless “where it is
11 inconsequential to the [ALJ's] ultimate nondisability determination.” *Id.* at 1115.
12 The burden of showing that an error is harmful generally falls upon the party
13 appealing the ALJ's decision. *Shinseki v. Sanders*, 556 U.S. 396, 409–10 (2009).

14 IV. Statement of Facts

15 The facts of the case are set forth in detail in the transcript of proceedings,
16 and only briefly summarized here. Mr. Gallegos was 25 years old at the time of his
17 hearing. AR 89. He attended high school through the ninth (AR 256) or tenth grade
18 (AR 40), and he has been unsuccessfully working to obtain his GED since 2009
19 (AR 373).

1 The ALJ found that Mr. Gallegos suffers from cognitive disorder, attention
2 deficit disorder, depressive disorder, anxiety disorder, alcohol abuse in sustained
3 remission, and polysubstance abuse. AR 20. Mr. Gallegos has a history of using
4 drugs and alcohol. AR 338-340, 393, 398.

5 V. The ALJ's Findings

6 The ALJ determined that Mr. Gallegos was not under a disability within the
7 meaning of the Act from March 23, 2010, the date the application was filed. AR
8 18.

9 **At step one**, the ALJ found that Mr. Gallegos had not engaged in substantial
10 gainful activity since March 23, 2010 (citing 20 C.F.R. § 416.971 *et seq.*). AR 20.

11 **At step two**, the ALJ found Mr. Gallegos had the following severe
12 impairments: cognitive disorder, attention deficit disorder, depressive disorder,
13 anxiety disorder (post-traumatic stress disorder/panic disorder), alcohol abuse in
14 sustained remission, and polysubstance abuse (citing 20 C.F.R. § 416.920(c)). AR
15 20.

16 **At step three**, the ALJ found that Mr. Gallegos did not have an impairment
17 or combination of impairments that meets or medically equals the severity of one
18 of the listed impairments in 20 C.F.R. § 404, Subpt. P, App. 1. AR 20.

19 **At step four**, the ALJ found Mr. Gallegos had the residual functional
20 capacity to perform a full range of work at all exertional levels with these non-

1 exertional limitations: (1) he can understand, remember, and carry out simple work
2 instructions and tasks learned through demonstration; (2) he needs a routine and
3 predictable work environment. AR 22.

4 At **step five**, the ALJ found that, in light of Mr. Gallegos' age, education,
5 work experience, and residual functional capacity, in conjunction with the
6 Medical-Vocational Guidelines, there are jobs that exist in significant numbers in
7 the national economy that he can perform including1 industrial cleaner, cleaner II,
8 and laundry worker. AR 25-26.

9 VI. Issues for Review

10 Mr. Gallegos argues that the Commissioner's decision is not free of legal
11 error and not supported by substantial evidence. Specifically, he argues the ALJ
12 erred by: (1) not finding that Mr. Gallegos meets listing 12.05(C) at step three; (2)
13 improperly rejecting a portion of the opinion of Mr. Gallegos' medical provider;
14 and (3) improperly rejecting Mr. Gallegos' subjective complaints.

15 VII. Discussion

16 A. The ALJ Did Not Err in Finding That Plaintiff Did Not Meet Listing 17 12.05(C).

18 a. Legal Standard.

19 Plaintiff argues that he is presumptively disabled at step three because he
20 meets or exceeds the criteria of Listing 12.05C. ECF No. 15 at 6.

1 A claimant is presumptively disabled and entitled to benefits if he or she
2 meets or equals a listed impairment. To meet a listed impairment, a disability
3 claimant must establish that his condition satisfies each element of the listed
4 impairment in question. *See Sullivan v. Zebley*, 493 U.S. 521, 530 (1990); *Tackett*
5 *v. Apfel*, 180 F.3d 1094, 1099 (9th Cir.1999). To equal a listed impairment, a
6 claimant must establish symptoms, signs, and laboratory findings at least equal in
7 severity and duration to each element of the most similar listed impairment.
8 *Tackett*, 180 F.3d at 1099-1100 (quoting 20 C.F.R. 404.1526).

9 The structure of Listing 12.05C is “unique” in that it “allows a claimant to
10 be found per se disabled without having to demonstrate a disabling, or even severe,
11 level of mental functioning impairment,” which sometimes leads to “curious
12 result[s].” *Abel v. Colvin*, 2014 WL 868821, at *4 (W.D. Wash. 2014) (internal
13 citation and quotation marks omitted). “The structure of the listing for intellectual
14 disability (12.05) is different from that of the other mental disorders listings.
15 Listing 12.05 contains an introductory paragraph with the diagnostic description
16 for intellectual disability. It also contains four sets of criteria (paragraphs A
17 through D). If [a claimant’s] impairment satisfies the diagnostic description in the
18 introductory paragraph and any one of the four sets of criteria, we will find that
19 [the claimant’s] impairment meets the listing.” 20 C.F.R. Pt. 404, Subpt. P, App. 1.

1 Thus, a claimant must meet the standard set forth in the introductory
 2 paragraph and at least one of the four listed criteria. *Id.* 20 C.F.R. Pt 404, Subpt. P,
 3 App. 1, Listing 12.05 reads, in relevant part:

4 Intellectual disability refers to significantly subaverage general
 5 intellectual functioning with deficits in adaptive functioning initially
 6 manifested during the developmental period; i.e., the evidence
 7 demonstrates or supports onset of the impairment before age 22.

8 The required level of severity for this disorder is met when the
 9 requirements in A, B, C, or D, are satisfied . . .

10 C. A valid verbal, performance, or full IQ of 60 through 70 and a
 11 physical or other mental impairment imposing an additional and
 12 significant work-related limitation of function.

13 In sum, in order to be considered presumptively disabled under Listing
 14 12.05(C) based on “intellectual disability,” a claimant must present evidence of:
 15 (1) “significantly subaverage general intellectual functioning with deficits in
 16 adaptive functioning” which initially manifested before the age of 22 (i.e., “during
 17 the developmental period”); (2) a “valid verbal, performance, or full scale IQ of 60
 18 through 70”; and (3) “a physical or other mental impairment imposing an
 19 additional and significant work-related limitation of function.” 20 C.F.R. Part 404,
 20 Subpart P, Appendix 1, § 12.05(C); *see Kennedy v. Colvin*, 738 F.3d 1172, 1174
 (9th Cir.2013).

It is important to note that, at step three of the sequential evaluation process,
 it is the claimant's burden to prove that his impairment meets or equals one of the
 impairments listed in 20 C.F.R. § 404, Subpart P. *Oviatt v. Com'r of Soc. Sec.*

1 *Admin.*, 303 F. App'x 519, 523 (9th Cir. 2008); *Hoopai v. Astrue*, 499 F.3d 1071,
2 1074–75 (9th Cir.2007); *Burch v. Barnhart*, 400 F.3d 676, 683 (9th Cir.2005).

3 In the case at hand the ALJ does not contest the third prong of 12.05(C), that
4 Mr. Gallegos has additional severe mental impairments. An additional impairment
5 satisfies the third prong of Listing 12.05(C) if it meets the definition of a “severe”
6 impairment at step two—i.e., “its effect on a claimant's ability to perform basic
7 work activities is more than slight or minimal.” *Fanning v. Bowen*, 827 F.2d 631,
8 633 & n. 3 (9th Cir.1987) (additional severe physical or mental impairment
9 “automatically satisfie[s] the more than slight or minimal effect standard” under
10 Listing 12.05(C)) (citations omitted); *see also* 20 C.F.R. Part 404, Subpart P,
11 Appendix 1, § 12.00(A) (for purposes of Listing 12.05(C) an additional
12 impairment “significantly limits [claimant's] physical or mental ability to do basic
13 work activities” if it “is a ‘severe’ impairment [], as defined in [20 C.F.R.] §§
14 404.1520(c) and 416.920(c)”). Here, the record indicates that Mr. Gallegos meets
15 the third prong, as the ALJ did indeed find additional severe impairments at step
16 two of the five-step sequential evaluation process. AR 20.

17 Instead, the ALJ found Mr. Gallegos does not meet Listing 12.05(C) because
18 he (1) does not have deficits in adaptive functioning and (2) he does not have a
19 valid IQ of 60 through 70. AR at 22. The Court must now examine whether the
20 ALJ's conclusion that Mr. Gallegos did not satisfy Listing 12.05(C) is supported by

1 substantial evidence and free from legal error. The Court concludes that it is for the
2 reasons set forth below.

3 **b. Deficit in Adaptive Functions Prior to Age 22.**

4 The first element of the listing at issue is whether or not Mr. Gallegos meets
5 the criteria set forth in the introductory paragraph; specifically, whether he had
6 “significantly subaverage general intellectual functioning with deficits in adaptive
7 functioning initially manifesting during the developmental period.” 20 C.F.R. Pt
8 404, Subpt. P, App. 1, Listing 12.05(C).

9 To satisfy the introductory paragraph of Listing 12.05C a claimant must
10 demonstrate “significantly subaverage general intellectual functioning with deficits
11 in adaptive functioning initially manifested during the developmental period; i.e.,
12 the evidence demonstrates or supports onset before age 22.” Listing 12.05C.

13 In this case, the ALJ did not contest that Mr. Gallegos met the required low
14 level of intellectual functioning prior to age 22. However, the ALJ concluded that
15 Mr. Gallegos’ effective adaptive functioning precluded a diagnosis of intellectual
16 disability, and therefore he could not meet the listing. AR 22. Specifically, the ALJ
17 concluded that:

18 “The claimant also has not provided evidence of deficits in adaptive
19 functioning prior to age 22. While the claimant’s representative
20 argued that the claimant’s history of suspension and disruptive
behaviors demonstrated deficits in social functioning, the record does
not provide any information as to what the specific behaviors were.
The claimant also presented no testimony or documentation regarding

1 his social functioning or behavior during school. A history of
2 suspensions and mere assertion of disruptive behavior does not
3 necessarily show a deficit in adaptive functioning consistent with the
4 requirements of the listing. AR 22.

5 A showing of early onset adaptive functioning deficits for purposes of
6 Listing 12.05(C) may be made by a claimant by the use of relevant circumstantial
7 evidence, such as difficulties with reading and writing, attendance of special
8 education classes, and dropping out of high school prior to graduating. *Jones v.*
9 *Colvin*, 149 F. Supp. 3d 1251, 1260–61 (D. Or. 2016)(claimant attended special
10 education classes, was reading at the eighth grade level when she was 18 years old,
11 did not have to complete any homework, was provided significant accommodation
12 at high school but was only able to achieve a modified diploma, took numerous
13 tries to pass her driver's license, and lives under the care of her parents); *see also*
14 *McGrew v. Colvin*, 2015 WL 1393291, at *6 (D.Or. Mar. 25, 2015); *Pedro v.*
15 *Astrue*, 849 F.Supp.2d at 1011–12; *Campbell v. Astrue*, 2011 WL 444783, at *17
16 (E.D.Cal. Feb. 8, 2011); *Payne v. Astrue*, 2010 WL 654319, at *11 (D.Ariz. Feb.
17 23, 2010); *Gomez v. Astrue*, 695 F.Supp.2d 1049, 1054-55 (C.D.Cal. 2010).

18 The Diagnostic & Statistical Manual of Mental Disorders describes “deficits
19 in adaptive functioning” to refer to a “failure to meet developmental and
20 sociocultural standards for personal independence and social responsibility.”
American Psychiatric Association, Diagnostic and Statistical Manual of Mental

1 Disorders 33 (5th ed. 2013). They limit functioning in at least one activity of daily
2 life, including communication and social participation in school, work, or other
3 environments. *Id.*

4 Importantly, in the case at hand, the ALJ appropriately found that Mr.
5 Gallegos never attended special education classes. In fact, the record demonstrates
6 that Mr. Gallegos was “tested for Special Education in the past, however, did not
7 qualify for services.” AR 22. While the non-attendance in special education classes
8 is not dispositive on this issue, it is important circumstantial evidence a court will
9 look to when determining deficits in adaptive functioning. *See Jones*, 149 F. Supp.
10 3d at 1260–61.¹ Additionally, the ALJ considered the contention by Mr. Gallegos’
11 counsel that Mr. Gallegos’ school records for suspensions for fighting, disruptive
12 conduct, and the failing of most of his classes demonstrate deficits in adaptive
13 functioning. In rejecting the school records as sufficient evidence, the ALJ
14 correctly stated that these records do not provide any information as to what the
15 specific behaviors were. AR 22. These bare school disciplinary records alone are
16
17

18 ¹ The Court has identified a number of cases finding or supporting a deficit in adaptive functioning, all of which
19 found, as part of the courts’ determination, that the claimants participated in special education classes. *See Sorter v.*
20 *Astrue*, 389 F. App’x 620, 622 (9th Cir. 2010); *Oviatt v. Com’r of Soc. Sec. Admin.*, 303 F. App’x 519, 523 (9th Cir.
2008); *Christner v. Astrue*, 498 F.3d 790, 794 (8th Cir. 2007); *Jones*, 149 F. Supp. 3d 1251, 1260–61 (D. Or. 2016);
McGrew, 2015 WL 1393291, at *6 (D.Or. Mar. 25, 2015); *Abel v. Colvin*, No. 12-CV-06025 JRC, 2014 WL
868821, at *4 (W.D. Wash. Mar. 5, 2014); *Pedro*, 849 F.Supp.2d at 1011–12; *Campbell*, 2011 WL 444783, at *17
(E.D.Cal. Feb. 8, 2011); *Payne*, 2010 WL 654319, at *11 (D.Ariz. Feb. 23, 2010); *Gomez*, 695 F.Supp.2d 1049,
1054-55 (C.D.Cal. 2010).

1 insufficient to meet Mr. Gallegos' burden of proof of deficits in adaptive
2 functioning prior to age 22.

3 The record does provide some evidence of Mr. Gallegos' history of only
4 completing the ninth or tenth grade, repeating grades, and struggling to obtain his
5 GED, which could support a possible determination that Mr. Gallegos did suffer
6 from deficits in adaptive functioning initially manifest prior to age 22. *See Jones v.*
7 *Colvin*, 149 F. Supp. 3d at 1260–6; *Pedro*, 849 F.Supp.2d at 1011–12. On the other
8 hand, given that Mr. Gallegos never attended special education classes, and
9 considering his lifestyle choices during his youth, including polysubstance use,
10 alcohol use, and gang involvement, it would not be unreasonable to conclude that
11 Mr. Gallegos' poor performance in school was not a reflection of a deficit in
12 adaptive functioning. AR 39, 71, 308, 321, 323-24, 326-27, 332, 338-39, 343, 352,
13 371, 376, 391-94, 396, 398, 401, 418, 420.

14 Here, there are factors that, if taken alone, cut in favor of Mr. Gallegos'
15 argument that he does suffer from a deficit in adaptive functioning manifest before
16 age 22, including the fact that he only completed the ninth or tenth grade, he
17 repeated grades, and he is struggling to obtain his GED. AR 236, 342-43, 373
18 However, the record also contains factors in opposition to Mr. Gallegos'
19 contentions, such as his history of polysubstance use, alcohol use, and gang
20

1 involvement. AR 39, 71, 308, 321, 323-24, 326-27, 332, 338-39, 343, 352, 371,
2 376, 391-94, 396, 398, 401, 418, 420.

3 Importantly, in determining whether substantial evidence exists, we look at
4 the record as a whole, considering both evidence that supports and undermines the
5 ALJ's findings. *Orteza v. Shalala*, 50 F.3d 748, 749 (9th Cir. 1995). However, on
6 review, the Court does not retry the case or alter credibility determinations and
7 factual findings; if the evidence is susceptible of more than one rational
8 interpretation, the decision of the ALJ *must* be upheld. *Id.*; *Moncada v. Chater*, 60
9 F.3d 521, 524–25 (9th Cir. 1995) (emphasis added). As such, the Court cannot
10 conclude that a finding in Mr. Gallegos' favor is warranted.

11 **c. IQ Score Validity.**

12 The second element of the listing at issue is whether or not Mr. Gallegos
13 provided a valid IQ score meeting the requirements of the listing.

14 A finding of intellectual disability under Section 12.05(C) requires “A *valid*
15 verbal, performance, or full IQ of 60 through 70.” 20 C.F.R. Pt 404, Subpt. P, App.
16 1, Listing 12.05 (emphasis added). Section 12.00(D) of the Appendix provides that
17 “where more than one IQ is customarily derived from the test administered ... the
18 lowest of these is used in conjunction with listing 12.05.” *Williams v. Shalala*, 35
19 F.3d 573 (9th Cir. 1994) (citing 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.00(D)).

1 The Ninth Circuit directs that an ALJ can decide that an IQ score is invalid.
2 *Thresher v. Astrue*, 283 F. App'x 473, 475 (9th Cir. 2008). In *Thresher*, the Ninth
3 Circuit stated that the “regulations’ inclusion of the word ‘valid’ in Listing 12.05C
4 makes the ALJ’s authority clear.” *Id.* Thus, an IQ score may be rejected as an
5 invalid score by an ALJ. However, the Ninth Circuit also noted that it had “never
6 decided what information is appropriately looked to in deciding validity,” but that
7 other circuit courts have said that a score can be questioned on the basis of “other
8 evidence,” but without explaining “exactly how other evidence impacts the validity
9 of the score itself,” and that other courts require “some empirical link between the
10 evidence and the score.” *Id.* at 475 n. 6 (citations omitted). “*Thresher* left that issue
11 unresolved, but it suggests, at a minimum, that an ALJ should not find that ‘other
12 evidence’ renders an IQ invalid without explaining how that evidence impacts the
13 validity of the score.” *Gomez v. Astrue*, 695 F. Supp. 2d 1049, 1057 (C.D. Cal.
14 2010).

15 The Ninth Circuit has provided guidance that is helpful. In the absence of
16 contrary opinion, the opinion of an examining provider (medical providers who
17 examine but do not treat a claimant) may not be rejected unless “clear and
18 convincing” reasons are provided. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.
19 1996) (as amended). Additionally, a school psychologist is considered an
20

1 acceptable medical source that can establish medically determinable impairments.
2 20 CFR § 416.913 (a)(2).

3 Here, Mr. Gallegos was administered a WAIS-IV IQ test, through which it
4 was determined that Mr. Gallegos has a full scale IQ of 69. AR 308. Carrie Bishop,
5 a school psychologist who administered the IQ test, stated that Mr. Gallegos
6 “exhibited difficulties with distraction during testing which may have had a
7 minimal effect on his ability to attend to the tasks and thus negatively affected his
8 overall performance.” *Id.* Ms. Bishop further opined that Mr. Gallegos’ “general
9 cognitive ability is within the extremely low range of intellectual functioning...
10 [h]is overall thinking and reasoning abilities exceed those of only approximately
11 2% of individuals his age,” and that there is a 95% confidence interval that his full
12 scale IQ is between 66 and 74, ultimately determining that Mr. Gallegos’ full scale
13 IQ score is 69. *Id.* Importantly, a full scale IQ score of 69 is within the 12.05(C)
14 requirements; and while Ms. Bishop did include the note that Mr. Gallegos’
15 difficulties with distractions may have minimally negative affect on his overall
16 performance, Ms. Bishop does not present any doubt as to the validity of the
17 ultimate score.

18 The ALJ provided three reasons for finding that Mr. Gallegos’ full scale IQ
19 score of 69 is not valid: (1) Mr. Gallegos only scored within the listing range on
20 one measure; (2) the examiner noted that Mr. Gallegos had difficulties with

1 distractions which may have had a minimally negative affect on his performance;
2 and (3) because the score is borderline within the listing and has a confidence
3 interval that goes up to 74. AR 22.

4 The Court finds the reasons provided by the ALJ to be insufficient. As noted
5 above, the lowest IQ derived from the test is used in conjunction with listing 12.05.
6 *Williams*, 35 F.3d at 573 (citing 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.00(D)).
7 In addition, Listing 12.05(C) only requires one score fall within the listing range,
8 not all of the scores.² The fact that Mr. Gallegos only had one score within the
9 listing range does not affect the ultimate determination. While the examiner does
10 note the Mr. Gallegos was distracted, she does not question the validity of the
11 overall outcome. Furthermore, there is no contrary medical opinion to that of Ms.
12 Bishop's, thus her determination may not be rejected unless "clear and convincing"
13 reasons are provided. *Lester*, 81 F.3d at 830. The ALJ failed to offer clear and
14 convincing reasons for disregarding Ms. Bishop's examining psychologist's
15 determination of Mr. Gallegos' full scale IQ score.

16 The Court finds the ALJ's determination that there is no valid IQ score is not
17 supported by substantial evidence. *Hill*, 698 F.3d 1144, 1158-59. When an ALJ
18 fails to provide adequate reasons for rejecting a treating or examining doctor's

19
20 ² 20 C.F.R. § Pt. 404, Subpt. P, App. 1 Listing 12.05(C) requires a "valid verbal, performance, or full scale IQ of 60 through 70." (emphasis added).

1 opinion, that opinion is credited as a matter of law. *Lester*, 81 F.3d at 834 (citations
2 omitted). Thus, the Court concludes that Mr. Gallegos provided a valid full scale
3 IQ score, the court concludes that Mr. Gallegos has satisfied the second element of
4 Listing 12.05(C). However, this error is harmless because, as stated above, Mr.
5 Gallegos failed to satisfy the first element of Listing 12.05(C), a deficit in adaptive
6 functioning that initially manifest prior to age 22.

7 **B. The Rejection of a Portion of Dr. Dougherty's Opinion was in Error.**

8 **a. Legal Standard.**

9 The Ninth Circuit has distinguished between three classes of medical
10 providers in defining the weight to be given to their opinions: (1) treating
11 providers, those who actually treat the claimant; (2) examining providers, those
12 who examine but do not treat the claimant; and (3) non-examining providers, those
13 who neither treat nor examine the claimant. *Lester v. Chater*, 81 F.3d 821, 830 (9th
14 Cir. 1996) (as amended).

15 A treating provider's opinion is given the most weight, followed by an
16 examining provider, and finally a non-examining provider. *Id.* at 830-31. In the
17 absence of a contrary opinion, a treating or examining provider's opinion may not
18 be rejected unless "clear and convincing" reasons are provided. *Id.* at 830. If a
19 treating or examining provider's opinion is contradicted, it may only be discounted
20

1 for “specific and legitimate reasons that are supported by substantial evidence in
2 the record.” *Id.* at 830-31.

3 The ALJ may meet the specific and legitimate standard by “setting out a
4 detailed and thorough summary of the facts and conflicting clinical evidence,
5 stating his interpretation thereof, and making findings.” *Magallanes v. Bowen*, 881
6 F.2d 747, 751 (9th Cir. 1989) (internal citation omitted). When rejecting a treating
7 provider’s opinion on a psychological impairment, the ALJ must offer more than
8 his or her own conclusions and explain why he or she, as opposed to the provider,
9 is correct. *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988). Additionally,
10 the ALJ is the “final arbiter” with regard to medical evidence ambiguities,
11 including differing physicians’ opinions. *Tommaetti v. Astrue*, 533 F.3d 1035, 1041
12 (9th Cir. 2008).

13 **b. Dr. Dougherty.**

14 Dr. Dougherty was an examining doctor. While neither the ALJ nor Mr.
15 Gallegos cite to a contrary opinion, the defendant does, and the Court’s review of
16 the record finds two contrary opinions. Dr. Dougherty stated that Mr. Gallegos
17 “[h]as some difficulty getting along with others.” AR 344. Non-examining State
18 agency psychologists, Jan L. Lewis, Ph.D. and John D. Gilbert, Ph.D., both direct
19 that Mr. Gallegos has no social interaction limitations. AR 74, 86. Thus, as there
20 does exist contrary opinion, the ALJ was required to provide “specific and

1 legitimate reasons that are supported by substantial evidence in the record” in order
2 to reject Dr. Dougherty’s opinion. *Lester*, 81 F.3d at 830-31. This required that the
3 ALJ include “a detailed and thorough summary of the facts and conflicting clinical
4 evidence, stating h[er] interpretation thereof, and making findings.” *Magallanes*,
5 881 F.2d at 751. Additionally, the ALJ is required to explain why she is correct as
6 opposed to Dr. Dougherty. *Embrey*, 849 F.2d at 421-22.

7 On December 16, 2010, examining psychologist Dr. Dougherty conducted a
8 psychological evaluation of Plaintiff. AR 336-344. The ALJ afforded “significant
9 weight to the opinion of Dr. Dougherty.” AR 24. However, the ALJ stated that she
10 does “not find Dr. Dougherty’s statement that the claimant has social difficulties
11 persuasive, given his ability to attend school, play basketball, etc., as mentioned
12 above” (referencing a previous paragraph also recognizing that Mr. Gallegos
13 reported playing basketball every day in 2011 and attending school for his GED).
14 AR 24-25.

15 In order to reject Dr. Dougherty’s opinion the ALJ must set out a detailed
16 and thorough summary of the facts and conflicting clinical evidence. Here, the ALJ
17 gave significant weight to the opinion of Dr. Dougherty, but then simply rejected
18 part of Dr. Dougherty’s opinion all-together with almost no discussion. AR 24-25.
19 The ALJ does not set out a detailed and thorough summary of the facts, but simply
20 notes two examples of possible social interaction. *Id.* Additionally, the ALJ does

1 not set out a detailed and thorough summary of the conflicting clinical evidence.
2 Indeed, the ALJ does not even cite to, or state, the existence of conflicting medical
3 opinions. Nevertheless, the ALJ previously found (contrary to her rejection of Dr.
4 Dougherty's opinion of claimant's social difficulties) that Mr. Gallegos has mild
5 difficulties in social functioning. AR 21.

6 The ALJ failed to provide specific and legitimate reasons for rejecting part
7 of Dr. Dougherty's opinion and failed to set out a detailed and thorough summary
8 of the facts and conflicting clinical evidence; furthermore, the ALJ did find that
9 Mr. Gallegos does have mild difficulties in social functioning. AR 21. When an
10 ALJ fails to provide adequate reasons for rejecting a treating or examining doctor's
11 opinion, that opinion is credited as a matter of law. *Lester*, 81 F.3d at 834 (citations
12 omitted). Moreover, the ALJ did not account for Mr. Gallegos' mild difficulties in
13 social functioning in her calculation of the residual functional capacity. An ALJ
14 must take into account all limitations and restrictions of a claimant when
15 calculating a residual functional capacity. *Valentine v. Comm'r Soc. Sec. Admin.*,
16 574 F.3d 685, 690 (9th Cir. 2009). Thus, this error is not harmless because it
17 cannot be considered inconsequential to the determination of disability. *Molina*,
18 674 F.3d at 1115.

19 **C. The ALJ properly discounted Mr. Gallegos' credibility.**
20

1 An ALJ engages in a two-step analysis to determine whether a claimant's
2 testimony regarding subjective symptoms is credible. *Tommasetti v. Astrue*, 533
3 F.3d 1035, 1039 (9th Cir. 2008). First, the claimant must produce objective
4 medical evidence of an underlying impairment or impairments that could
5 reasonably be expected to produce some degree of the symptoms alleged. *Id.*
6 Second, if the claimant meets this threshold, and there is no affirmative evidence
7 suggesting malingering, "the ALJ can reject the claimant's testimony about the
8 severity of [his] symptoms only by offering specific, clear, and convincing reasons
9 for doing so." *Id.*

10 In weighing a claimant's credibility, the ALJ may consider many factors,
11 including: "(1) ordinary techniques of credibility evaluation, such as the claimant's
12 reputation for lying, prior inconsistent statements concerning the symptoms, and
13 other testimony by the claimant that appears less than candid; (2) unexplained or
14 inadequately explained failure to seek treatment or to follow a prescribed course of
15 treatment; and (3) the claimant's daily activities." *Smolen*, 80 F.3d at 1284. When
16 evidence reasonably supports either confirming or reversing the ALJ's decision, the
17 Court may not substitute its judgment for that of the ALJ. *Tackett v. Apfel*, 180
18 F.3d 1094, 1098 (9th Cir.1999). Here, The ALJ found that the medically
19 determinable impairments could reasonably be expected to produce the symptoms
20 Mr. Gallegos alleges; however, the ALJ determined that Mr. Gallegos' statements

1 regarding intensity, persistence, and limiting effects of the symptoms not credible.

2 AR 23.

3 **a. Mr. Gallegos' daily activities.**

4 The ALJ noted several activities of daily living that are inconsistent with Mr.
5 Gallegos' allegations of the intensity, persistence, and limiting effects of his mental
6 impairments. In particular, the ALJ noted: walking a track, playing basketball,
7 attending school consistently, no difficulty in attending school, household chores,
8 cooking, personal care, and reading for 60 to 90 minutes at a time. AR 24, 342,
9 352, 395. These activities reflect a level of functioning that is inconsistent with Mr.
10 Gallegos' claims of disability.

11 The Court does not find the ALJ erred when assessing Mr. Gallegos'
12 credibility because his activities of daily living are inconsistent with his alleged
13 severity of his impairments.

14 **b. Inconsistency with the record.**

15 The ALJ asserted that Mr. Gallegos' reports regarding his past
16 polysubstance abuse and alcohol use are inconsistent with the record and cast
17 doubt on the reliability of his statements. For example, Mr. Gallegos testified that
18 he had never done drugs or had problems with alcohol, he was also not
19 forthcoming with his drug use in his examination by Dr. Dougherty; however, the
20 record is replete with Mr. Gallegos' statements of past polysubstance use, alcohol

1 use, having gone to treatment five times for polysubstance abuse, having gone to
2 treatment for alcohol abuse, and his having received two DUIs. AR 24, 308, 323,
3 326-27, 332, 338-39, 343, 352, 371, 376, 391-94, 398, 401, 418, 420.

4 Thus, the ALJ did not err when assessing Mr. Gallegos' credibility because
5 his testimony is inconsistent with the evidence in the record.

6 **c. Failure to treat.**

7 In consideration of Mr. Gallegos' credibility, the ALJ noted that he has
8 failed to actively pursue treatment. AR 24. A claimant's statements may be less
9 credible when treatment is inconsistent with the level of complaints or a claimant is
10 not following treatment prescribed without good reason. *Molina*, 674 F.3d at 1114.
11 When refusing prescribed treatment, the reasons presented for not following the
12 treatment must be related to the mental impairment and not a matter of personal
13 preference. *Id.* "Unexplained, or inadequately explained, failure to seek treatment .
14 . . can cast doubt on the sincerity of [a] claimant's pain testimony." *Fair v. Bowen*,
15 885 F.2d 597, 603 (9th Cir. 1989).

16 The ALJ points out that Mr. Gallegos attended two intake evaluations in
17 March and September 2010, but he never actually attended treatment. AR 24. Mr.
18 Gallegos did not obtain the recommended chemical dependency evaluation. *Id.*
19 Numerous missed appointments and cancellations in the record support the ALJ's
20 conclusions. AR 375, 391, 394, 408, 411, 413, 416, 419. Even though Mr.

1 Gallegos had been on medication for a short time and reported doing well, getting
2 out, becoming more active, and sleeping better, he stopped returning to his primary
3 care provider for medication in August 2011. AR 24, 355.

4 The overall record demonstrates that Mr. Gallegos has significant
5 unexplained gaps in treatment and he did not follow the prescribed treatment, thus
6 the ALJ did not err in assessing his credibility.

7 **D. Remedy.**

8 The Court has the discretion to remand the case for additional evidence and
9 findings or to award benefits. *Smolen*, 80 F.3d at 1292. The Court may award
10 benefits if the record is fully developed and further administrative proceedings
11 would serve no useful purpose. *Id.* Remand is appropriate when additional
12 administrative proceedings could remedy defects. *Rodriguez v. Bowen*, 876 F.2d
13 759, 763 (9th Cir. 1989). In this case, the Court finds that further proceedings are
14 necessary for a proper determination to be made.

15 On remand, the ALJ shall credit the opinion of Dr. Dougherty. Once
16 accepting this opinion, the ALJ shall recalculate the residual functional capacity,
17 considering all impairments, and then evaluate, based on this updated residual
18 functional capacity, Mr. Gallegos' ability to perform work available in the national
19 economy.
20

VIII. Conclusion

Having reviewed the record and the ALJ's findings, the Court finds the ALJ's decision is not supported by substantial evidence and contains legal error.

Accordingly, **IT IS ORDERED:**

1. Plaintiff's Motion for Summary Judgment, **ECF No. 15**, is **GRANTED**, **in part.**

2. Defendant's Motion for Summary Judgment, **ECF No. 17**, is **DENIED.**

3. The District Court Executive is directed to enter judgment in favor of Plaintiff and against Defendant.

4. This matter is **REMANDED** to the Commissioner for further proceedings consistent with this Order.

IT IS SO ORDERED. The District Court Executive is directed to enter this Order, forward copies to counsel and **close the file.**

DATED this 13th day of October, 2016.

s/Robert H. Whaley
ROBERT H. WHALEY
Senior United States District Judge